STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Energy North Natural Gas Corp. d/b/a Liberty

Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas

Docket No. DG 21-130

Motion in *Limine* of the Office of the Consumer Advocate
Seeking Prehearing Determination that Request to Recover $4 Million
Constitutes Illegal Retroactive Ratemaking

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves *in limine*[1] for an order limiting the scope of the upcoming hearing in this docket. In support of this request, tendered pursuant to N.H. Code Admin. Rules Puc 203.07, the OCA states as follows:

I. Introduction

The Commission opened this docket to consider the request of Energy North Natural Gas Corporation d/b/a Liberty ("Liberty") for changes to its firm sales cost-of-gas (COG) rates for the coming winter peak period as well as separate COG rates for next year's summer off-peak period. The filing also seeks changes to the Company's Local Distribution Adjustment ("LDAC") charge. The new COG and

[1] For a description of the motion *in limine* and its usefulness in judicial (and presumably quasi-judicial) proceedings, *see* Wright & Miller, *Federal Practice and Procedure*, §5037.10, especially at notes 38 to 49 (noting that such motions can enable parties to better prepare for trials (and, thus, evidentiary hearings) and are a "useful adjunct" to other methods of truncating such trials and hearings (e.g., summary judgment motions).

LDAC rates would take effect on November 1, 2021; the revised LDAC would be applicable to all of Liberty's natural gas customers in New Hampshire.[2]

Liberty made its filing on September 1, 2021. The Commission conducted a duly noticed prehearing conference on September 22, 2021. Thereafter, the parties met in a technical session for the purpose, *inter alia*, of agreeing upon a procedural schedule. The parties reached such an agreement, memorialized by Liberty in a letter filed with the Commission on September 23, 2021 (tab 9). Pursuant to the schedule approved by the Commission, there will be another technical session on October 13, 2021, a revised filing (with updated numbers and a narrative description of changes) from Liberty on October 19, 2021, and an evidentiary hearing before the Commission (as determined in the Commission's order of notice) on October 25, 2021. As is customary, this case is proceeding at an expedited pace so as to allow the COG rates ultimately approved by the Commission to reflect as accurately as possible the wholesale costs incurred by the utility in meeting the natural gas needs of its customers.

The news reflected in Liberty's initial filing (tab 1) was not good from a customer perspective. As explained in the prefiled written direct testimony of Deborah M. Gilbertson, senior manager for energy procurement for Liberty Utilities Service Corporation, natural gas futures at the NYMEX hub were trading at their

[2] The Commission has opened a separate docket, DG 21-132, to consider Liberty's request for changes to the COG rates applicable to customers in the company's Keene division. The LDAC determination in the instant docket would apply throughout the Liberty service territory.

highest summer levels in seven years, which she said was "largely related to fears regarding natural storage levels for the coming winter." Testimony of Deborah M. Gilbertson at Bates 38, lines 11-12. She added that hot summer temperatures "stymied consistent, larger injections relative to the five year average"—i.e., there was relatively little natural gas being placed into storage during the summer months (historically, the time to put gas into storage because usage in summer is relatively low) – and that demand for exports of natural gas to international markets, in the form of liquefied natural gas, were "robust," thus "reduc[ing] supply availability to U.S. markets." *Id.* at lines 12-15. The bottom line: For residential customers, Liberty is seeking a firm sales cost of gas rate of $0.9056 per therm for effect on November 1, 2021, compared to an initial rate of $0.5571 per therm approved by the Commission a year ago for the 2020-2021 winter. This is a whopping big increase by any measure.

This motion does not concern itself with the propriety of these drastic increases in COG charges; that is something to hash out at hearing. Rather, this motion concerns the simultaneous adjustment Liberty is seeking to its LDAC – specifically, a component of the LDAC known as the Revenue Decoupling Adjustment Factor ("RDAF").

As explained in the prefiled written direct testimony of Liberty witnesses David B. Simek and Catherine A. McNamara, the RDAF allows Liberty to "recover or refund, on an annual basis, the difference between the Actual Base Revenue per

Customer and the Benchmark Base Revenue per customer." Testimony of David B. Simek and Catherine A. McNamara at Bates 14, lines 16-18. As the result of Order No. 26,122, entered by the Commission on April 27, 2018 in Docket No. DG 17-048, Liberty became the first utility in New Hampshire to adopt a decoupling mechanism, whose purpose is "to sever the link between . . . sales and revenues to remove the Company's disincentive to promote energy conservation that is inherent in traditional ratemaking." Order No. 26,122 at 43.

Though decoupling and its purpose are relatively straightforward in principle, implementation of decoupling by Liberty has been a somewhat challenging proposition. *See* Order No. 26,149 (June 22, 2018) at 1 (granting partial rehearing of Order No. 26,122 to allow "further review" of Liberty's claim that the initial order "will not provide the intended revenues"); Order No. 26,187 (November 2, 2018) (approving revised decoupling tariff); Order No. 26,412 (September 30, 2020) (addressing effects of decoupling mechanism on temporary rates for subsequent rate case); and Order No. 26,505 (July 30, 2021) at 7 (approving rate case settlement agreement intended in part to "clarify the decoupling mechanism and associated tariff language"). Now, via the instant COG filing and attendant request to update the LDAC, Liberty seeks to recover, over two years via the RDAF, $4,024,830 which, according toMr. Simek and Ms. McNamara, was "improperly refunded to residential customers" over the preceding two years. Simek/McNamara

Testimony at Bates 15, lines 7-10.

This motion seeks an order *in limine* – i.e., at the threshold of the October 25 hearing – determining that Liberty may not recover the $4,024,830 from customers and, therefore precluding Liberty from introducing evidence in support of this recovery request. The OCA is requesting this determination just prior to hearing because (1) recovery of this sum is precluded as a matter of law (and thus no facts are in dispute) and (2) it would be conducive to the most efficient use of both the Commission's resources and those of the parties to avoid the use of hearing time to this question. *See supra* at n.1.

II. Liberty is seeking an illegal act of retroactive ratemaking.

It is black letter law in New Hampshire that a public utility may not impose a rate increase on a retroactive basis. *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) ("it is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively") (quoting *Southwest Gas Corp. v. Public Service Comm'n*, 474 P.2d 379, 383 (Nev. 1970)). When it so ruled in 1980, the New Hampshire Supreme Court acknowledged (and implicitly overruled) twos prior decision of the Court, *Pennichuck Water Works v. State*, 103 N.H. 49 (1960), and *Nelson v. Public Service Co.*, 119 N.H. 327 (1979), grounding its analysis not in statute (as had the previous decisions) but, rather, in part 1, article 23 of the New Hampshire Constitution. *Appeal of Pennichuck Water Works*, 120 N.H. at 565. As noted by the Court, this provision of our state constitution states

that "[r]etrospective laws are highly injurious, oppressive and unjust" and, "[n]o such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." Therefore, in New Hampshire, "the State may not create a new obligation in respect to a transaction already past." *Appeal of Pennichuck Water Works, supra*, quoting *Geldhof v. Penwood Associates*, 119 N.H. 754 (1979); *see also Opinion of the Justices*, 123 N.H. 349, 354 (1983) (noting that "utilities are constitutionally prohibited from seeking rate increases for services rendered prior to the date they make such requests" and, thus, "the legislature could not retrospectively tax utility franchises"); *see also* Order No. 26,493 (June 30, 2021) in Docket No. DW 19-131 at 22 (acknowledging this principle and extending it to "terms such as ownership of and financial responsibility for the maintenance of equipment").

Lofty constitutional principles aside, the Court in *Pennichuck Water Works* offered a straightforward and commonsense explanation, *viz*:

> We are mindful of the fact that public utilities may not increase their rates with the same freedom as an unregulated business. However, even where a product is unregulated, the consumer is confident once he purchases a product that the merchant will not later claim that he is liable for a retroactive price increase on the product.[3]

[3] In this context, it bears noting why a decoupling mechanism is itself not an example of retroactive ratemaking, given that under such a mechanism future revenue requirements are adjusted in light of previous revenue surpluses or deficiencies. The answer is that the adjustment mechanism is itself spelled out in the tariff so that, unlike customers of the unregulated firm described hypothetically by the Court in *Pennichuck Water Works*, customers of a utility with a decoupling mechanism are on notice of the pending adjustment and can, theoretically, adjust their consumption accordingly. *See, e.g.*, Regulatory Assistance Project, " Revenue Regulation and Decoupling (2016) at 50-51 and n.54 (describing the proper design of a decoupling mechanism to avoid retroactive ratemaking). The cited treatise is available at https://www.raponline.org/wp-content/uploads/2016/11/rap-revenue-regulation-decoupling-guide-second-printing-2016-november.pdf.

Pennichuck Water Works, 120 N.H. at 566. In so explaining, the Court acknowledged the existence of a potentially countervailing constitutional consideration: the specter of a rate that is confiscatory because it forces the utility "to provide service to the public at rates which are inadequate for it to realize a reasonable rate of return." *Id.* But this danger is only relevant because, "where a merchant will immediately impose a price increase" as costs escalate, "a regulated utility may not be able to do so because of delays inherent in the regulatory process." *Id.*

There is no such danger that can be attributed to the present situation. The *Pennichuck Water Works* case concerned the permissible effective date for temporary rates as authorized under RSA 378:27 – a statute whose purpose, presumably, is to correct the effect of regulatory delay when a revenue deficiency triggers the filing by a utility of a rate case. Here, as witnesses Simek and McNamara have forthrightly and correctly acknowledged, any deficiency is not attributable to regulation but, rather, to Liberty simply having made a mistake for which only the Company is responsible.

III. This issue was *not* resolved in Liberty's favor via DE 20-105.

As previously referenced, in its order approving the settlement agreement on permanent rates in the recent Liberty rate case, the Commission noted that the settlement "included provisions related to Liberty's decoupled rate structure designed to clarify the decoupling mechanism and associated tariff language."

Order No. 26,505 at 7, *supra*. at 4. The Commission stated that these provisions of the settlement agreement "include five key points relating to (1) revenue per customer calculations, (2) incremental revenue per customer calculations, (3) the Managed Expansion Program premium; (4) a Revenue Decoupling Adjustment on Liberty's balance sheets; and (5) the revenue per customer calculation reporting requirements." *Id.* Although the Commission did not discuss these "key points" in its order – there was no need to, because they were not in dispute – the order itself is, by its terms, applicable only to service rendered on and after August 1, 2021." *Id.* at 15. Nothing in Order No. 26,505 supports the notion that the Commission was ignoring the constitutional principles laid out in the cases cited *supra* by authorizing the adjustment of charges for service rendered prior to that date.

The language in the settlement agreement itself is likewise devoid of any language suggesting the parties intended to disregard the New Hampshire Constitution and authorize the collection of rates retroactively because the decoupling mechanism required clarification. The settlement simply lays out the five key points listed by the Commission, in somewhat more detail, and refers to new tariff language, appended to the settlement, to "effectuate" this "understanding" of how the decoupling mechanism would work thenceforth. Settlement Agreement in Docket No. DG 20-105, tab 64, at 18-19.

IV. Symmetry

When this controversy was under discussion at the September 22 prehearing conference and technical session, Liberty pointed out that if the tables were turned – i.e., if Liberty had misapplied the decoupling mechanism so as to over-collect from customers – the Office of the Consumer Advocate would be clamoring for refunds. As, indeed, we almost certainly would.

But this is not a valid argument for allowing Liberty to collect, in effect, a refund *from* its customers. The relationship between a utility and its customers – indeed, the relationship between any investor-owned business and its customers – is not a symmetrical one. As noted, *supra*, in appropriate circumstances a utility may be entitled to raise its prices to avoid what would otherwise be, in effect, a taking of shareholder property without just compensation. There is no corresponding constitutional protection for customers in the event that rates become unreasonably high.

New Hampshire law authorizes the Commission to direct a utility to pay reparations to customers in appropriate circumstances. *See* RSA 365:3 and :34. *Id.* at 9. As the New Hampshire Supreme Court explained in *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980), when the Commission exercises its authority to award reparations to customers from a utility, the agency is effectively applying the common law doctrine of "unjust enrichment," i.e., enforcement of "a promise implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him." *Id.* at 539 (citations omitted). Although the Court

in the *Granite State Electric* case actually suggested via *dicta* that the constitutional prohibition on retroactive rates would preclude refunds to customers in at least some circumstances, *see id.* at 538, the point here is that the governing principle is not necessarily symmetrical. Liberty is the utility; the Department of Energy, the Office of the Consumer Advocate, and the Public Utilities Commission are not. As the Court stated in *Pennichuck Water Works*, its decision "merely requires that public utilities, like other businesses, monitor their costs of doing business and employ sound business judgment in determining when they should seek a rate increase for future services." *Pennichuck Water Works*, 120 N.H. at 567. It is thus Liberty's sole responsibility to operate its business effectively – by, *inter alia*, designing a decoupling mechanism that works properly.

V. Conclusion

For the reasons stated herein, Liberty's pending request to recover $4,024,830 which the utility claims was "improperly refunded to residential customers," is inconsistent with the New Hampshire Constitution and basic notions of transactions between a business and its customers. The Commission should so declare and limit the scope of this proceeding accordingly.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the motion *in limine* set forth above, and

B. Determine as a matter of law that Granite State Electric Company d/b/a Liberty Utilities may not recover the $4,024,830 which the utility claims was "improperly refunded to residential customers,"

C. Strike references to the allegedly improper "refund" from the Company's prefiled testimony, and

D. Determine that evidence related to the disputed $4,024,830 is inadmissible at hearing as irrelevant.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis